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No. 10-1004

Supreme Court, U.S.
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In The
# Supreme Court of the United States

PIRELLI PNEUS, LTDA,

*Petitioner,*

v.

GARY GUNN, Individually, and as guardian of KATHY GUNN, his wife, an incapacitated person,

*Respondents.*

**On Petition For Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether due process limitations permit the exercise of jurisdiction over the foreign producer of an allegedly defective product, based on the forum contacts of distributors of the product, without evidence showing either control by the producer over the distributors or some legally recognized basis for disregarding their separate corporate identities.

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## STATEMENT OF THE CASE

Gary Gunn, individually and as guardian of his wife, Kathy Gunn ("Respondents") filed suit in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, for damages suffered as a result of a defective tire manufactured by Pirelli Pneus Ltda. ("Pirelli Pneus"), under theories of strict liability in tort and negligence. Respondents' Amended Complaint contained jurisdictional allegations that Pirelli Pneus knowingly utilized a nationwide scheme to distribute its manufactured tires throughout the United States, including the State of Florida, where Respondents purchased the alleged defective tire. Respondents' Amended Complaint further alleged that as a result of said distribution scheme, Pirelli Pneus purposefully availed itself of doing business in Florida and maintained sufficient minimum contacts to justify being subject to jurisdiction in a Florida court.

Pirelli Pneus moved to dismiss Respondents' Amended Complaint for lack of jurisdiction and insufficient service of process. Pirelli Pneus filed affidavits in support of its motions, which contained averments that contested some, but not all, of the jurisdictional allegations alleged in the Respondents' Amended Complaint.

An evidentiary hearing was held on Pirelli Pneus' motion to dismiss and motion to quash service of process, at which Respondents objected to the legal sufficiency of the affidavits submitted by Pirelli

Pneus, under Fla. Stat. § 92.50(3), because the seals and signatures present on the affidavits were not legible and were written in a foreign language.[1] In response, Pirelli Pneus did not offer additional legally sufficient affidavits; evidence that the previously submitted affidavits comported with Fla. Stat. § 92.50; or live testimony supporting the averments contained in the previously submitted affidavits. Other than the alleged legally insufficient affidavits, Pirelli Pneus did not introduce any additional evidence at the evidentiary hearing that contested the jurisdictional allegations of Respondents' Amended Complaint. Instead, Pirelli Pneus requested leave to file English language translations of the seals of the affidavits after the conclusion of the evidentiary hearing. The trial court granted Pirelli Pneus' request and translations of the seals were filed six days after conclusion of the evidentiary hearing. However, the English language translations on their face failed to establish that the individual who authenticated the affidavits was authorized to administer affidavits in Brazil in compliance with Fla. Stat. § 92.50(3). The translations additionally failed to evidence that the affiants were placed under oath; that the affiants

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[1] Fla. Stat. § 92.50(3) states that oaths, affidavits, and acknowledgements, required or authorized by the laws of Florida, may be taken or administered in any foreign country, by or before any judge or justice of a court of last resort, any notary public of such foreign country, any minister, consul general, charge d'affaires, or consul of the United States resident in such country.

understand the English language; or that the affiants were known, or presented identification, to the individual who administered the affidavits. Moreover, the supplemental filing of the English language translations did not contain the name of the individual who translated the affidavits or any oath by the translator that the translation constitutes a true translation of the writing into the English language.

At the evidentiary hearing, Respondents also introduced invoices and bills of lading in support of its argument that Pirelli Pneus purposefully availed itself of doing business in the State of Florida, such that it would anticipate being haled into Florida's courts, by knowingly utilizing a scheme to distribute its products throughout Florida and the entire United States. Pirelli Pneus did not object to Respondents' introduction of said invoices and bills of lading at the evidentiary hearing.

The trial court ultimately denied Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction. The trial court granted dismissal of three other foreign Pirelli co-defendants but said corporate defendants, unlike Pirelli Pneus, were mere holding companies that did not manufacture tires, much less the allegedly defective tire that caused injury to Respondents. The trial court additionally denied Pirelli Pneus' motion to quash service of process, which was based on the state law argument that Respondents improperly served Pirelli Pneus via the Florida Secretary of State pursuant to Fla. Stat. § 48.181.

Pirelli Pneus sought review of the trial court's order denying its request for dismissal for lack of jurisdiction, and request to quash service of process, to Florida's Second District Court of Appeal. Pirelli Pneus argued in its Initial Brief that reversal of the trial court's order is warranted on state law grounds because Respondents failed to allege and prove jurisdictional facts to satisfy Florida's long-arm statute and failed to meet their evidentiary burden to even invoke consideration of federal due process limitations. Pirelli Pneus additionally argued that the evidence in the record fails to provide a basis for the exercise of jurisdiction over it pursuant to Justice O'Connor's "stream of commerce plus" test, which has been adopted and applied consistently by the Second District Court of Appeal.

In their Answer Brief, Respondents argued to the Second District Court of Appeal that the trial court's order denying Pirelli Pneus' motion to dismiss for lack of jurisdiction should be affirmed under Florida state law because the jurisdictional facts alleged in the Respondents' Amended Complaint were unrefuted by the legally insufficient affidavits submitted by Pirelli Pneus. Respondents additionally argued that Florida's exercise of jurisdiction comported with constitutional notions of due process, including satisfaction of Justice O'Connor's "stream of commerce plus" theory.

The Second District Court of Appeal affirmed, without a written opinion, the trial court's denial of Pirelli Pneus' motion to dismiss for lack of jurisdiction and motion to quash service of process. Pirelli Pneus

now petitions this Court to review the decision of the Second District Court of Appeal though same might have potentially rested on adequate and independent grounds based on Florida state law.[2]

## REASONS TO DENY THE PETITION

This Court should deny Pirelli Pneus' Petition for Certiorari because this Court may not take jurisdiction to review a decision of a state court that might rest on adequate and independent state grounds. Also, the Court should deny the Petition because resolution of the alleged conflict between the courts regarding the interpretation of the plurality opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987) would not affect the lower ruling of the Second District Court of Appeal. Furthermore, the Petition is not appropriate for resolution by GVR because no conclusion can be made that the future opinions by the Court in *J. McIntyre Machinery, Ltd. v. Nicastro,* Case No. 09-1343, and *Goodyear Luxembourg Tires, S.A. v. Brown,* Case No.

[2] The Second District Court of Appeal could have rested its decision on the grounds that the affidavits submitted by Pirelli Pneus, in support of its Motion to Dismiss for Lack of Jurisdiction, were not authenticated by an individual authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3); that the affidavits were not of proper form; or that the affidavits failed to fully refute the jurisdictional allegations contained in Respondents' Amended Complaint.

10-76, will reveal a reasonable probability that the Second District Court of Appeal would reject the basis on which its decision rests upon consideration of said future opinions.

## I. The Court should not exercise its jurisdiction to review the Second District Court of Appeal's decision since it might have rested on adequate and independent state law grounds

Pursuant to Florida law, if a plaintiff's complaint alleges sufficient jurisdictional facts which demonstrate that a foreign defendant is subject to Florida's long-arm jurisdiction, the burden shifts to said foreign defendant to file a motion to dismiss, together with a legally sufficient affidavit or other sworn proof, that contests the essential jurisdictional facts contained in the plaintiff's complaint. *Hilltopper Holding Corp. v. Estate of Cutchin ex rel. Engle*, 955 So.2d 598, 601 (Fla. 2d DCA 2007); *Kin Yong Lung Indus. Co., Ltd. v. Temple*, 816 So.2d 663, 666 (Fla. 2d DCA 2002); *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla. 1989). If the affidavit filed by the foreign defendant fully disputes the jurisdictional allegations in plaintiff's complaint, the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction over the foreign defendant exists. *Id.* However, if the foreign defendant fails to dispute the jurisdictional facts contained in plaintiff's complaint, no burden of proof shifts back to the plaintiff and the foreign

defendant's motion to dismiss for lack of jurisdiction must be denied, without any consideration of due process limitations. *Hilltopper Holding*, 955 So.2d at 601; *Lampe v. Hoyne*, 652 So.2d 424, 426 (Fla. 2d DCA 1995); *Waye v. Eddings*, 638 So.2d 582 (Fla. 1st DCA 1994).

In Pirelli Pneus' appeal of the trial court's order to the Second District Court of Appeal, Respondents argued that denial of Pirelli Pneus' motion to dismiss was proper because Pirelli Pneus failed to fully dispute the jurisdictional allegations of Respondents' Amended Complaint. This argument presented to the underlying appellate court was based on principles of Florida state law, which if accepted, would warrant affirmance of the trial court's order without further consideration of due process limitations or any other federal question.

Specifically, Respondents argued to the Second District Court of Appeal that the affidavits submitted by Pirelli Pneus, in support of its motion to dismiss for lack of jurisdiction, were legally insufficient under Florida law, and therefore may not be used to challenge jurisdiction. *Orbe v. Orbe*, 651 So.2d 1295, 1296 (Fla. 5th DCA 1995); *Ben-Aziz v. Polani*, 710 So.2d 125 (Fla. 4th DCA 1998). Respondents argued that the English language translations of the seals present on the affidavits, which were filed with the trial court six days after the conclusion of the evidentiary

hearing,[3] failed to establish that the individual who authenticated the affidavits was authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3).[4] Respondents also argued that the English language translations of the seals failed to demonstrate that the affiants were placed under oath by the individual who administered the affidavit; that the affiants understood the English language; that the affiants were known or presented identification to the individual who administered the affidavit; the name of the individual who translated the seals; or an oath by said translator that the translation constitutes a true translation of the oath into the English language. *See Fla. Stat.* § 90.606(3); *B.C.S., S.r.l. v. Wise,* 910 So.2d 871 (Fla. 5th DCA 2005).

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[3] Respondents objected to the legal sufficiency of the affidavits during the evidentiary hearing on the basis that the Respondents were unable to determine whether the signature and seal present on the affidavits were those of an individual authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3), because the signature and seal were not legible and written in a foreign language. In response to Respondents' objections, the trial court permitted Pirelli Pneus to file English language translations of the seals, though the evidentiary hearing had concluded.

[4] The individual who authenticated the affidavits was listed as an "authorized clerk." Respondents argued to the Second District Court of Appeal that Fla. Stat. § 92.50 does not explicitly provide that an individual holding the title "authorized clerk" may administer affidavits that will be deemed legally sufficient in the state of Florida.

Respondents alternatively argued before the Second District Court of Appeal that the affidavits submitted by Pirelli Pneus contained averments that failed to fully refute the jurisdictional allegations alleged in Respondents' Amended Complaint. As a result of said failure, Respondents argued that the burden never shifted to the Respondents to refute the allegations contained in the affidavits submitted by Pirelli Pneus, thereby requiring denial of Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction.[5]

By setting forth these referenced arguments relative to the affidavits submitted by Pirelli Pneus, the Respondents presented adequate and independent grounds based on Florida state law supporting the denial of Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction. Given that the Second District Court of Appeal's decision on review is without a written opinion, it is indeterminable whether the Second District Court of Appeal based its decision to affirm the trial court's denial of Pirelli Pneus' motion to dismiss on federal due process grounds, or on the evidentiary and procedural grounds based on Florida state law.

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[5] Respondents additionally argued that due to the fact the submitted affidavits were legally insufficient as presented without English translations at the evidentiary hearing, Pirelli Pneus failed to offer any evidence at said hearing that contested the jurisdictional allegations contained in Respondents' Amended Complaint.

It has been well established that this Court will not take jurisdiction to review a state court decision that might have rested upon an adequate and independent nonfederal ground. *Stembridge v. State of Georgia,* 343 U.S. 541, 547 (1952). This principle emanates from the Court's respect for the independence of state courts and the avoidance of rendering advisory opinions. *Michigan v. Long,* 463 U.S. 1032, 1040-42 (1983) (If the same decision would be rendered by the state court after this Court corrected its views of federal laws, this Court's review would amount to nothing more than an advisory opinion). This Court has applied this principle to decline review of state court decisions without written opinion, which on their face are inconclusive whether the state court might have rested its decision on an adequate state ground. *Durley v. Mayo,* 351 U.S. 277 (1956); *Ellis v. Dixon,* 349 U.S. 458, 459 (1955).

The state grounds brought forth in argument by the Respondents before the Second District Court of Appeal provided a legal basis to affirm the trial court's order denying Pirelli Pneus' motion to dismiss on a adequate basis independent of federal due process considerations. Therefore, under the assumption that the Second District Court of Appeal based its decision on Florida state law, this Court's review of the federal due process limitations as to the facts of the instant matter would have no effect in reconsideration of the Second District Court of Appeal's decision. For this reason, this Court should decline exercising its jurisdiction to review this matter for

the risk of issuance of an opinion merely advisory in nature. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991) ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory").

Moreover, Pirelli Pneus maintains the burden of demonstrating that these adequate and independent state grounds cannot account for the Second District Court of Appeal's decision. *See Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 70-71 (1948) (Party seeking review has the burden of affirmatively establishing the Court's jurisdiction). Pirelli Pneus has failed to satisfy its burden of establishing the Court's jurisdiction given that its Petition completely fails to address the adequate and independent state grounds in which the Second District Court of Appeal's decision potentially rested.

However, Pirelli Pneus did address Respondents' state law arguments in its Reply Brief to the Second District Court of Appeal. In said Brief, Pirelli Pneus set forth the argument that the referenced state grounds presented by Respondents should not be taken into consideration by the Second District Court of Appeal because: (1) Respondents' argument that the affidavits were legally insufficient should have been cross-appealed to the Second District Court of Appeal given the trial court's ruling that Pirelli Pneus' submitted affidavits were legally sufficient; and (2) that

Respondents improperly argued for the first time on appeal that Pirelli Pneus' submitted affidavits failed to fully refute the jurisdictional allegations present in Respondents' Amended Complaint.

Notwithstanding these arguments, established Florida law provides that the Second District Court of Appeal was not barred from considering Respondents' arguments relative to the insufficiency of Pirelli Pneus' submitted affidavits. Pursuant to the "tipsy coachman rule," an appellate court is permitted to affirm a decision of the trial court despite a finding of error in the trial court's reasoning if there is an alternative basis to justify affirming the decision. *Malu v. Security National Insurance Company,* 898 So.2d 69, 73 (Fla. 2005); *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638, 644 (Fla. 1999) (If a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record); *Firestone v. Firestone,* 263 So.2d 223, 225 (Fla. 1972) (The findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it).

The Florida Supreme Court has extended the "tipsy coachman rule" to provide that an appellee is not limited to the legal arguments expressly asserted as grounds for the judgment in the lower court. *Radio Station WQBA* at 645. Instead, the appellee can present any argument supported by the record even if

not expressly asserted in the trial court. *Id.* More importantly, the Florida Supreme Court has further established that an appellee "content with the judgment below need not assign error in order to support that judgment and is not limited in the appellate courts to the theories of recovery stated by the trial court." *Malu* at 73; *Radio Station WQBA* at 645 (Appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in defense when the appellant attacks the judgment on appeal); *MacNeill v. O'Neal,* 238 So.2d 614, 615 (Fla. 1970) (Appellee not aggrieved by the lower court's decision need not file cross-assignments of error in order to have the points considered on appeal).

Pursuant to these holdings of the Florida Supreme Court, the Second District Court of Appeal would not have committed error in considering and resting its decision on the state law grounds argued in Respondents' Answer Brief in the lower appeal. Therefore, Pirelli Pneus' previous argument, which Respondents anticipate being reasserted before this Court, that Respondents should have been precluded from presenting arguments on the sufficiency of Pirelli Pneus' submitted affidavits to the Second District Court of Appeal, fails.

For these foregoing reasons, the Court should not exercise jurisdiction to review the Second District Court of Appeal's decision in the instant matter.

## II. The Fact that Courts are in Conflict Regarding the Application of the Stream of Commerce Theory promulgated in *Asahi* has no Effect on the Second District Court of Appeal's decision

Pirelli Pneus argues that certiorari is warranted because state and federal courts are in conflict regarding the exercise of jurisdiction over foreign manufacturers who place defective products in the stream of commerce for ultimate arrival in the United States. However, the conflict addressed by Petitioner can be summarized as a conflict between which of two theories should be applied in determining whether due process limitations are satisfied by a forum's exercise of jurisdiction over a foreign defendant who places a defective product into the stream of commerce. Given that the Second District Court of Appeal for the State of Florida has adopted the more stringent of the two established "stream of commerce" theories, this Court's potential resolution of which "stream of commerce" theory should be applied in evaluation of due process limitations concerning in personam jurisdiction would have no effect on the Second District Court of Appeal's decision in the instant matter.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987), this Court interpreted the "stream of commerce" theory of personal jurisdiction which had been previously set forth in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). Such interpretation consisted of two

plurality opinions, one by Justice O'Connor and one by Justice Brennan, which provided two divergent views of the stream of commerce principles set forth in *World-Wide Volkswagen*.

In *Asahi*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, opined that mere awareness resulting from placing a product in the stream of commerce, without more, does not constitute an act purposefully directed toward a forum State so as to be adequate for the exercise of jurisdiction over a foreign defendant. *Asahi*, 480 U.S. at 112. Instead, Justice O'Connor iterated that a foreign defendant must undertake additional conduct indicating an intent or purpose by said defendant to serve the market in the forum State. *Id.*

Justice Brennan, joined by Justices White, Marshall, and Blackmun, provided a less stringent view of the stream of commerce theory than Justice O'Connor, opining that a foreign defendant who places goods in the stream of commerce directly benefits from the sale of the product in the forum State, and indirectly benefits from the protection of the forum State's laws regulating commercial activity. *Asahi*, 480 U.S. at 117. Justice Brennan asserted that since these benefits accrue regardless if the foreign defendant engages in additional conduct directed toward the forum State, jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause without a required showing of additional conduct directed

toward the forum state. *Id.* Accordingly, Justice Brennan's view disagrees with Justice O'Connor's requirement that a foreign defendant, who places its product into the stream of commerce, must demonstrate an intent or purpose to serve the market in the forum State in order for that state to properly exercise its jurisdiction over the foreign defendant.

As discussed in Pirelli Pneus' Petition, state and federal courts have conflicted for the past twenty-five years regarding whether Justice O'Connor's more stringent "stream of commerce plus" theory or Justice Brennan's more lenient pure "stream of commerce" theory is the proper standard to be applied in determining whether a forum's exercise of jurisdiction over a foreign defendant comports with due process limitations. *See* Petition for Writ of Certiorari, p. 6-7. Nonetheless, Petitioner's request for certiorari on the basis of said conflict between the courts is improper given the fact that the Second District Court of Appeal for the State of Florida has adopted Justice O'Connor's more stringent "stream of commerce plus" theory. *See Kin Yong Lung Indus. Co., Ltd. v. Temple,* 816 So.2d 663 (Fla. 2d DCA 2002); *Shin-Kobe Elec. Machinery Co., Ltd. v. Rockwell,* 750 So.2d 67 (Fla. 2d DCA 1999).

Justice O'Connor's "stream of commerce plus" theory was presented and argued by both Petitioner and Respondents to the Second District Court of Appeal in the instant matter. In its Initial Brief, Pirelli Pneus specifically cited Justice O'Connor's opinion in *Asahi*, together with case law from the

Second District Court of Appeal adopting O'Connor's viewpoint, in support of its argument that due process limitations prevent the State of Florida from exercising jurisdiction over Pirelli Pneus pursuant to the stream of commerce theory. In their Answer Brief, the Respondents acknowledged the Second District Court of Appeal's adoption of the O'Connor standard and argued that the factual circumstances of the instant matter would not defeat the proper exercise of jurisdiction by the State of Florida under the "stream of commerce plus" theory. In fact, the parties never referenced or addressed Justice Brennan's conflicting pure stream of commerce theory in any of the briefs filed with the Second District Court of Appeal.

Therefore, if we assume that the Second District Court of Appeal's decision was decided solely on the stream of commerce theory of jurisdiction, it is without doubt that the court applied Justice O'Connor's more stringent "stream of commerce plus" theory, as opposed to Justice Brennan's more lenient "stream of commerce" theory. Given that the stream of commerce theory containing the higher due process threshold would have been applied in the instant matter, Pirelli Pneus' request for this Court to resolve the conflict between Justice O'Connor and Justice Brennan's stream of commerce theories would result in an irrelevant, advisory opinion to the litigants. *See Alabama v. Shelton,* 535 U.S. 654, 676 (2002) (The Court has a longstanding refusal to issue advisory opinions). Clearly, the Second District Court of Appeal would uphold the exercise of jurisdiction over Pirelli Pneus

under Justice Brennan's standard if it upheld the exercise of jurisdiction over same under Justice O'Connor's "stream of commerce plus" standard. *Osorio v. Dole Food Co.*, 2009 WL 48189 (S.D. Fla. 2009) (Where the contacts meet O'Connor's most stringent standard, there is no need to consider whether the contacts would meet the other standards); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (No need to determine stream of commerce standard which actually controls the case when jurisdiction over defendant is consistent with due process under O'Connor's more stringent "stream of commerce plus" analysis).

For these reasons, Pirelli Pneus' request for this Court to review the jurisdictional issues decided by the Second District Court of Appeal on the basis that state and federal courts are in conflict over which stream of commerce theory to apply is improper. Conversely, a decision more appropriate for review by this Court would involve a lower state or appellate tribunal upholding the exercise of jurisdiction over a foreign defendant through application of Justice Brennan's pure stream of commerce theory. *See J. McIntyre Machinery, Ltd. v. Nicastro*, Case No. 09-1343; *Goodyear Luxembourg Tires, S.A. v. Brown*, Case No. 10-76. The foreign defendant in such an instance would have a legitimate argument regarding the conflict between state and federal courts' application of the *Asahi* plurality opinions, because said defendant could be subject to jurisdiction in the United States tribunals applying Justice Brennan's

theory while simultaneously exempted from jurisdiction in tribunals applying Justice O'Connor's stricter "stream of commerce plus" theory. However, in the present matter, any resolution by this Court of the present conflict regarding the application of the *Asahi* plurality opinions would not subject Pirelli Pneus to a more stringent stream of commerce test than would have been applied by the Second District Court of Appeal.

Pirelli Pneus further points out that review of the stream of commerce conflict between the courts is warranted because of the potential danger of forum shopping by a plaintiff selecting the forum most likely to require the foreign defendant to come and defend itself on the merits. However, alleged forum shopping is clearly absent in the instant matter as Respondents brought suit against Pirelli Pneus in a forum that applies the stricter O'Connor "stream of commerce plus" standard. Given that Pirelli Pneus has not been aggrieved by an act of forum shopping, and that Pirelli Pneus had the benefit of arguing its case in a forum that applies the stricter O'Connor standard, any solemnization of the *Asahi* opinions by review of this Court would not affect the Second District Court of Appeal's decision. Again, a more appropriate decision for review of the *Asahi* opinions, and the potential danger of forum shopping, would arise from a forum that applies the Brennan standard, due to the potential prejudice suffered by a foreign defendant by the plaintiff choosing a forum

with less stringent due process requirements for the exercise of its jurisdiction over a foreign defendant.

Pirelli Pneus additionally argues that this Court should grant review to resolve conflict between an apparent split in authority over evidentiary burdens and procedures utilized in resolving jurisdictional disputes. In support of its argument, Pirelli Pneus cites decisions of various Federal Circuit Courts that divulge on the exact evidentiary and procedural burdens that should be placed on the respective plaintiff and defendants in a jurisdictional dispute. Notwithstanding same, the evidentiary burden and procedures utilized in the instant matter are not available for review by this Court as they are matters of Florida state law. *See generally Venetian Salami*, 554 So.2d 499 (Fla. 1989); *Hilltopper Holding Corp.*, 955 So.2d 598 (Fla. 2d DCA 2007). Therefore, any conflict between the evidentiary burdens and procedures undertaken in the Federal Circuit Court cases cited by Pirelli Pneus is impertinent to the decision of the Second District Court of Appeal.[6] More importantly, however, is the fact that Pirelli Pneus never raised any dispute concerning the evidentiary burdens or procedures that would have been applied pursuant to

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[6] Only one Federal Circuit expressly refuses to transfer the burden of proving fairness of the exercise of jurisdiction by a forum to the foreign defendant. *See* Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 Cap. U.L. Rev. at 711.

Florida law in its appeal to the Second District Court of Appeal in the instant matter.

Throughout its Petition, Pirelli Pneus laments that thousands of state and federal decisions have applied and interpreted the *Asahi* opinions on a case-by-case basis since they were rendered in 1987. In light of this fact, it can be assumed that this Court has previously denied hundreds of requests for certiorari review of the stream of commerce theory from lower courts that applied the O'Connor standard, that applied the Brennan standard, and which wrote significantly detailed opinions outlining their application of the *Asahi* standards. Therefore, Respondents find it disingenuous for Pirelli Pneus to set forth that the underlying decision from the Second District Court of Appeal, which is without written opinion and could have only been decided under the stricter O'Connor "stream of commerce plus" test, is the proper decision for the Court to review a twenty-five year conflict of federal and state jurisprudence. For the reasons set forth herein, Respondents believe that denial of Pirelli Pneus' Petition is appropriate.

## III. Contrary to Pirelli Pneus' Contentions, this Case is not Ideally Positioned for GVR

In support of its argument that a GVR is warranted in the instant matter, Pirelli Pneus argues that two separate cases currently pending on review before this Court will result in opinions that will call the Second District Court of Appeal's decision into

question. *See J. McIntyre Machinery, Ltd. v. Nicastro,* Case No. 09-1343; *Goodyear Luxembourg Tires, S.A. v. Brown,* Case No. 10-76. For this reason, Pirelli Pneus requests that the Court hold this petition until decisions in these referenced cases are rendered, grant its Petition, vacate the decision of the Second District Court of Appeal, and remand for further consideration in light of the decisions in those cases.

However, upon application of this Court's standard for issuing a GVR to the instant matter, in light of the legal issues present for review in the *Nicastro* and *Brown* cases, it is evident that contrary to Pirelli Pneus' contentions, this case is not properly positioned for GVR.

This Court has established that an order granting certiorari, vacating the judgment below, and remanding the case (GVR) is *potentially* appropriate when intervening developments, that this Court has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter. *Lawrence v. Chater,* 516 U.S. 163, 167 (1996).

As previously discussed herein, the decision below by the Second District Court of Appeal, without a written opinion, might have potentially rested on adequate and independent state grounds. Accordingly, it is indeterminable whether the Second District

Court of Appeal even determined the federal question of due process limitations or any federal question related to the questions currently presented for review in *Nicastro* and *Brown*. As such, no basis exists for a conclusion that the Second District Court of Appeal's decision rests upon a premise that would be rejected upon consideration of the future opinions issued by this Court in the *Nicastro* and *Brown* cases. If the Second District Court of Appeal's decision was indeed based on adequate and independent state grounds, any further redetermination of the intervening decisions in *Nicastro* and *Brown* would not affect the ultimate outcome of the Second District Court of Appeal's decision.

Additionally, any intervening opinion by this Court in review of *Nicastro* and *Brown* would not affect the ultimate outcome of the Second District Court of Appeal's decision in the instant matter even if we assume said decision rested on federal due process considerations. The state court decisions on review before this Court in *Nicastro* and *Brown* specifically concern the express acceptance of a pure stream of commerce theory, and simultaneous rejection of the more stringent O'Connor standard, that would have been applied by the Second District Court of Appeal in the instant matter.

In *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (N.J. 2010), *cert. granted*, 131 S.Ct. 63 (2010), the Supreme Court of New Jersey followed its own precedent established in *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*, 102

N.J. 460, 508 A.2d 1127 (N.J. 1986), a pre-*Asahi* opinion which articulated a stream of commerce theory akin to Justice Brennan's pure stream of commerce standard. As specifically stated by the New Jersey Supreme Court in *Nicastro*:

> "Today, we reaffirm the reasoning of our decision in *Charles Gendler*, and hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action. All in all, *Charles Gendler,* in pronouncing when a State court can exercise personal jurisdiction over a defendant based on the stream-of-commerce doctrine, gave a faithful and fair reading of *World Wide Volkswagen,* one that is more reflective of Justice Brennan's views expressed in *Asahi.*"

*Nicastro,* 201 N.J. at 73.

In *Brown v. Meter,* 681 S.E.2d 382 (N.C. Ct. App. 2009), *cert. granted*, 131 S.Ct. 63 (2010), the Court of Appeals of North Carolina, in ruling that the stream of commerce analysis may apply to consideration of general in personam jurisdiction, followed North Carolina state court precedent in declining to follow the "stream of commerce plus" standard advocated by Justice O'Connor in *Asahi*. *Brown,* 681 S.E.2d at 390.

Based on the lower court rulings in *Nicastro* and *Brown*, it can be assumed that the crux of this Court's review of *Nicastro* and *Brown* will concern a clarification of the divulging stream of commerce standards promulgated in *Asahi* and a clearer determination of whether the O'Connor standard, or a less stringent pure stream of commerce theory, is the appropriate test for consideration of due process limitations in the exercise of in personam jurisdiction.

In application to the instant matter, if this Court fully adopts a pure stream of commerce theory in its future opinions in *Nicastro* and *Brown*, the Second District Court of Appeal would clearly not reject its decision that would have rested on the stricter "stream of commerce plus" test. Moreover, if this Court fully adopts the "stream of commerce plus" test, it cannot be said that any intervening development arose that the Second District Court of Appeal did not fully consider in potentially resting its decision on federal due process grounds.

For these reasons, a GVR order is not appropriate under the standard promulgated by this Court in *Lawrence v. Chater*, 516 U.S. 163 (1996).

## CONCLUSION

For the reasons set forth herein, this Court should deny the Petition for Writ of Certiorari and deny Pirelli Pneus' request for GVR.

Respectfully submitted,

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